ATTACHMENT 5

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March 3, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex parte - CC Docket No. 00-4
In the Matter of Application of SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas

Dear Ms. Salas:

Our client, AT&T Corp. ("AT&T"), wishes to respond to several assertions made for the first time in SBC's reply comments regarding the offering by CLECs of voice and xDSL service over an unbundled loop obtained from SBC. These assertions, which bear on critical issues in this proceeding, are false and misleading, as demonstrated by other portions of SBC's reply as well as recent events in Texas. This letter also responds to new arguments presented by SBC regarding its "separate affiliate" and explains why SBC's reliance on the SBC/Ameritech merger conditions is irrelevant to a 271 application.

Combining xDSL with UNE-P

In its initial comments, AT&T demonstrated that SBC was violating its nondiscrimination obligations by refusing to implement measures that would enable AT&T, either by itself or in conjunction with another carrier, to provide voice and xDSL service over a single line. In its reply comments, SBC acknowledges, for the first time, that CLECs have a right to do just that. Specifically, in attempting to explain its dilatory provisioning of xDSL capable loops, SBC states (at 25 n.11) that, "if CLECs chose to offer voice services, they could share the voice line in precisely the same way as SBC." SBC then blames its deficient performance on CLECs, claiming (id.) that "they don't want to offer voice service; they just want to share SBC's voice channel."

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SBC's statement that CLECs "don't want to offer" voice and data service is patently false. It is refuted not only by AT&T's comments and declarations, but elsewhere by SBC itself. Acknowledging the concerns raised by AT&T, and purporting to address them, SBC assures the Commission (at 37 n.19) that "AT&T is free to offer both voice and data service over the UNE-Platform or other UNE arrangements, whether by itself or in conjunction with an xDSL partner." To the contrary, although AT&T wishes -- and needs -- to "offer both voice and data services over the UNE Platform," SBC has made it impossible for AT&T to do so in an efficient, prompt, and non-disruptive manner. Thus, it is SBC's refusal to allow AT&T "to share the voice line in precisely the same way as SBC," and not CLEC business plans, that explains the absence of combined xDSL/voice competition in Texas today.

But SBC is not merely being intransigent; it is also misrepresenting its position to the Commission.[1] Specifically, as explained in the attached Declaration of Michelle Bourianoff,

AT&T's latest experiences in attempting to obtain nondiscriminatory access to provide xDSL service in Texas are disturbingly reminiscent of its experience in attempting to obtain nondiscriminatory access in order to provide competing voice service using UNE-P. SBC first interposes an array of legal objections (*e.g.*, objections to combining elements, resistance to TELRIC pricing), which delay and increase the costs of competitive entry. When those legal barriers are finally removed, SBC then raises successive layers of technical and operational barriers and objections.

At the same time, SBC has been accelerating its deployment of "Project Pronto," with the avowed objective of being the "only" carrier in Texas capable of offering voice and data service over the same line. The stonewalling of AT&T and other CLECs is just as much a part of SBC's strategy as is its own deployment. See Pfau/Chambers Decl. at ¶¶ 6-61. The record is clear that

[1] Sad to say, such conduct is not aberrational for SBC. Just as it previously represented to Congress that it could lawfully transfer from the courts to the Commission the prohibition on RBOC provision of interLATA service, only to later pursue a lawsuit challenging the constitutionality of that very action, SBC is representing one thing to the Commission about xDSL, while telling CLECs exactly the opposite.

SBC voice customers who wish to add SBC's xDSL service need not order a second line, transition their voice service from the first to the second line, or incur all the attendant costs and risks of service disruption. At the same time, the record also shows that would-be customers of AT&T cannot obtain voice and xDSL services without incurring these costs and risks. Putting aside all the problems with converting SBC's local voice service customers to an AT&T service provided through the UNE Platform, there is in Texas simply no established mechanism -- none -- for AT&T to add an xDSL capability to the services it provides via UNE-P. *A fortiori*, there is no manner in which AT&T can procure from SBC the processes, procedures, and mechanisms needed to add xDSL capability as swiftly, seamlessly, reliably, and economically as when SBC adds this capability for its own customers.

This is not what the statute means by "nondiscriminatory." This is not "parity. This is not "full implementation." This is not checklist compliance.[2]

Reliance on the "Separate Affiliate"

With respect to the proposed "separate affiliate" for advanced services, AT&T has already addressed most of SBC's arguments fully in comments filed on January 31 and reply comments filed February 22. But SBC offers two new arguments on reply that require a response.

First, SBC claims that comments directed to the shortcomings of SBC's proposed separate affiliate constitute a "collateral attack on the New York Order." SBC Reply at 36. This is absurd. The Commission in that order expressly disclaimed reliance on Bell Atlantic's separate affiliate proposal (New York Order at ¶ 39). That proposal had been presented extremely late in the 90-day 271 process; the Department of Justice was afforded no opportunity to comment; and the final text of the order -- released just three business days after other parties filed their comments on the subject -- contained not one single citation to any of the comments that explored, in detail, the many deficiencies of Bell Atlantic's proposal. Under the circumstances, and particularly in light of its statements that it did not rely on the proposal, the Commission's other statements about it have little if any precedential value.

Second, SBC's main response to the observations of multiple parties that its separate affiliate is not "fully operational" is that SBC is "six months ahead of Bell Atlantic" (SBC Reply at 37). But that is not the test – even under the language of the New York Order upon which SBC relies. SBC's affiliate is not "fully operational" today, and it will remain far less than truly separate during a transitional period that still has some months to run (*see, e.g.*, SBC Ramsey Reply Aff. at ¶ 4).

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[2] Nor does it advance the statutory goal of broad, competitive deployment of advanced services.

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Further, as the Commission noted in the SBC/Ameritech Merger Order, the separate affiliate requirements were designed solely for purposes of the merger. The Commission was emphatic on this point. In adopting the merger conditions, the Commission emphasized that its action was not intended to -- and did not -- constitute "an interpretation of [SBC's legal obligations under] the Communications Act, especially Sections 251, 252, 271, and 272 of the Commission's rules . . . ."[3] Thus, no interpretation, modification, or waiver of the merger conditions can alter SBC's legal obligations under those statutory provisions.[4] Nor should any interpretation, modification, or waiver be considered without evaluating its impact on SBC's ability to meet its statutory duties. If a conflict arises between Section 251 or another statutory provision and the merger conditions, it is the law -- not the merger conditions – that is paramount.

The central problem that SBC overlooks is that the *statute* requires nondiscrimination, while the *merger conditions* permit discrimination. This is most vividly demonstrated by the Reply Affidavit of Ms. Ramsey (at ¶ 7):

> No SBC ILEC will discriminate in favor of ASI in the procurement of goods, services, facilities or information, or in the establishment of standards *except to the extent authorized by the Merger Conditions*. To the extent SBC ILECs plan, develop, or design new services for or with ASI, they will also plan, develop, or design new services with other entities on a nondiscriminatory basis *unless a Merger Conditions exception applies* . . . . The SBC ILECs will not discriminate between ASI and unaffiliated entities with regard to any goods, services, or non-public information relating to exchange access service *unless a Merger Conditions exception applies* . . . . With *the exception of certain Advanced services equipment covered by the Merger Conditions*, the SBC ILECs will provide interLATA or intraLATA facilities to nonaffiliated entities on a nondiscriminatory basis.

Thus, the most SBC can say is that it is complying with merger conditions that specifically contemplate various forms of discrimination, conditions that the Commission unequivocally stated do not constitute a determination with regard to what is required by

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[3] SBC/Ameritech Merger Order ¶ 357; see id. ¶¶ 356, 511. The conditions represent "a floor and not a ceiling." Id. ¶ 356. They "address potential public interest harms specific to the merger, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA market." Id. ¶ 357.

[4] The Commission must be "especially" careful not to rely on the SBC/Ameritech merger conditions to define SBC's nondiscrimination obligations under Section 251 and Section 271 of the Act. See id. ¶ 357. Indeed, the merger conditions "tail" may not and should not be permitted to wag the statutory "dog."

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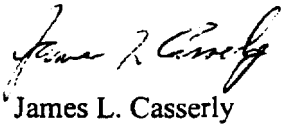
Sections 251 and 271 (both of which call for "nondiscriminatory" treatment of requesting carriers). Whether or not SBC complies with the merger conditions is certainly a worthy subject for an enforcement proceeding, but it is simply irrelevant to checklist compliance in connection with a Section 271 application.

Conclusion

Section 271 applicants are required to prove their case in their initial applications, not subsequently. But here the new additions to the record merely confirm what has been apparent all along: SBC's showing on xDSL matters is wholly inadequate to demonstrate compliance with the competitive checklist. Only a decisive rejection for these failures can create the necessary incentives (as specifically contemplated by Congress) for SBC to remedy these deficiencies.

Please place a copy of this correspondence in the record of this proceeding. Two copies of this Notice are being submitted to the Secretary of the Commission in accordance with Section 1.1206(b)(2) of the Commission's Rules.

Sincerely,



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Counsel for AT&T Corp.

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Mr. Larry Strickling
Mr. Robert Atkinson
Ms. Michele Carey
Mr. Chris Wright
Mr. Jon Nuechterlien
Ms. Debra Weiner

ATTACHMENT 6

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	CC Docket No. 00-4
And Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance for Provision of In-Region	)	
InterLATA Services in Texas	)	

COMMENTS OF AT&T CORP. IN OPPOSITION TO SOUTHWESTERN BELL TELEPHONE COMPANY'S SECTION 271 APPLICATION FOR TEXAS

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January 31, 2000

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Services, Inc. d/b/a Southwestern Bell Long	)	
Distance for Provision of In-Region	)	
InterLATA Services in Texas	)	

COMMENTS OF AT&T CORP. IN OPPOSITION TO SOUTHWESTERN BELL TELEPHONE COMPANY'S SECTION 271 APPLICATION FOR TEXAS

SUMMARY AND INTRODUCTION

SWBT's Application repeatedly asserts that its showing with respect to both the competitive landscape in Texas and its compliance with the competitive checklist is significantly better than the showing made by Bell Atlantic's recent successful Section 271 application. In fact, nothing could be further from the truth. While far from perfect, the prospect for local competition in New York is better than it is in Texas. In New York, three large carriers -- AT&T, MCI WorldCom and Sprint -- are currently mass marketing to residential customers throughout the State, using either their own facilities or unbundled network elements ("UNEs"). By contrast, no competing carrier is mass marketing such services anywhere in Texas. As a result, the share of facilities loops provided by competitors to residential customers in Texas is an anemic 0.2%.[1] Even if one includes UNE-based competition, CLEC residential share is only 3.4% in Dallas/Fort Worth and Houston, and only 1.2% in other areas. Kelley/Turner Decl., Att.

[1] Declaration of A. Daniel Kelley and Steven E. Turner ("Kelley/Turner Decl.") (Exh. A) ¶ 13 & Table 1. By "facilities" competition, we mean service provided by loops that competitors own or obtain from carriers other than SWBT.

3. As of the end of 1999, Texas CLECs were adding only about 20,000 UNE Platform ("UNE-P") lines per month, while New York CLECs were adding UNE-P lines at over five times that rate. Id. ¶ 46.[2]

Moreover, SWBT's claims about the state of competition in Texas are, in many cases, based on SWBT's own inflated estimates of CLEC penetration. Kelley/Turner Decl. ¶¶ 16-45. Even competition for business customers is limited and generally confined to a few downtown urban areas. There is minimal facilities-based competition for business customers outside these areas. Id. ¶ 32 & Table 5. In sum, the real data shows that the vast majority of customers in Texas have no realistic choice of local carriers, SWBT's claims to the contrary notwithstanding.

The present lack of competition in Texas is not the result of any lack of interest or effort on the part of CLECs. There is no doubt that the Texas telecommunications market is among the most attractive in the nation to would-be competitors. And the Texas Public Utility Commission ("TPUC") has repeatedly confirmed the good faith efforts of CLECs to enter the Texas market.[3] Indeed, Chairman Wood of the TPUC -- following a visit to AT&T's local service facilities -- specifically noted that AT&T has a "very impressive operation", and added: "It's very clear to me that AT&T is committed to full bore UNE entry. . . ."[4]

---

[2] With virtually no residential service being provided over CLEC-owned loops, the UNE-P is currently the principal means by which CLECs are providing competitive residential service.

[3] See, e.g., TPUC Project No. 16251, 5/21/98 Open Mtg. Tr. at 1887-88. (Commissioner Curran: "Here we have a situation where potential competitors have spent enormous effort and time, and probably money, attempting to gain a foothold in the local telephone market. The regulatory agency has spent untold hours . . . and this enormous effort has resulted in a movement of just 1 percent of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest . . . on the part of potential competitors".)

[4] TPUC Project No. 16251, 9/9/99 Open Mtg. Tr. at 77-78.

Because the Texas market is attractive, and because AT&T and many other CLECs have expended enormous time, effort and money in an effort to penetrate that market, the Commission must look elsewhere for an explanation of why AT&T and others have achieved so little success. The answer lies with SWBT. SWBT's hostility to local competition -- and the lengths to which it has gone to oppose local entry -- are extraordinary. For example, unlike Bell Atlantic-New York, (i) SWBT has refused to withdraw its unlawful "glue charges" (see Section I.D below); (ii) it has sought to convert supposed third-party "intellectual property rights" into a barrier to UNE-based entry (see Section I.C below); and (iii) it has repeatedly defied or ignored orders of its State Commission designed to facilitate local entry.[5] Moreover, the Commission need not rely on AT&T's observations to establish SWBT's hostility to local competition. Until very recently, SWBT made no pretense to the contrary,[6] and, in Texas, neutral decision-makers have specifically found in various proceedings that SWBT has (1) failed to negotiate in good faith with CLECs seeking interconnection; (2) intentionally suppressed key information in arbitrations; (3) failed to perform in good faith under its interconnection agreements; (4) raised "obviously nonmeritorious" issues in appeals from TPUC decisions on interconnection agreements; (5) acted contrary to the public interest in causing an AT&T consultant to withdraw from its systems integration work on AT&T's UNE Platform residential customer services

[5] Declaration of Phillip W. Tonge and Edward P. Rutan II ("Tonge/Rutan Decl.") (Exh. B) ¶ 12. Indeed, so egregious was the problem that the TPUC found it necessary -- following the Texas 271 hearings in April 1998 -- to order SWBT to follow its orders. TPUC Project No. 16251, Order No. 25, Public Interest Recommendation No. 12 (6/1/98).

[6] Thus, one SWBT executive stated, on the eve of the introduction in the Texas legislature of a bill relating to opening local service to competition: "We want to make our welcome mat smaller than any else's." Tonge/Rutan Decl. ¶ 27. And, of course, SBC -- several years later -- sought to have the market opening provisions of the 1996 Federal Telecommunications Act (the "Act") declared unconstitutional in an effort to obtain long distance authority without opening its local market to competition at all. Id. ¶ 28.

support systems; and (6) violated key provisions of the Commission's order approving SBC's merger with Ameritech. Tonge/Rutan Decl. ¶¶ 30, 32, 39, 42, 44, 57.

These incidents (and many like them) are relevant here because they affect both the ability and the willingness of would-be competitors to enter the Texas market. Under the best of circumstances, it is a costly and risky undertaking to enter a market dominated by an entrenched monopolist, and it is particularly risky where a putative competitor must rely on the facilities (and the good faith cooperation) of that monopolist to do business. However, those risks increase exponentially when the monopolist has SWBT's track record of hostility to competition. These increased risks make it more difficult for would-be entrants both to attract capital and to justify investing it in Texas. Rather, they are more likely to invest in entry in markets where they can reasonably anticipate making commercial use of their investment, and where their entry will not be delayed indefinitely as they litigate with SWBT every conceivable issue -- however preposterous -- through the court of last resort. These considerations undoubtedly help explain why three major carriers have begun to make mass market offers in New York, while none has yet in Texas.

Because competition in Texas remains de minimis, and because the "irreversibility" of that limited competition -- in light of SWBT's history -- is much in doubt, it is imperative that the checklist requirements of § 271 be rigorously observed. While SWBT -- through the (until recently)[7] tireless efforts of the TPUC -- has made progress toward meeting the requirements of the checklist, it has not yet achieved checklist compliance in a number of important areas.

First, and of particular concern to AT&T, is the fact that SWBT has threatened to terminate xDSL service to customers who seek to switch to voice service offered by AT&T via the UNE-P. Similarly, SWBT has failed to implement nondiscriminatory operating procedures

that would enable CLECs using the UNE-P architecture to provide voice service also to offer xDSL service (either themselves or through partnerships with xDSL providers). This conduct -- which, as we show in Section I.A below, is unlawful under the Act in several ways -- has the effect (and the clear purpose) of foreclosing AT&T from providing local voice service in Texas. The demand for xDSL service is enormous (indeed, SWBT has explicitly stated that xDSL is a "powerful way to attract and retain customers in an increasingly competitive market"), and SWBT has ensured that it is the only significant provider of xDSL services in Texas at this time. Although several data CLECs have been trying to achieve entry since mid-1998, SWBT -- through bad faith negotiation, intransigence and discovery abuse in an arbitration which the TPUC expressly intended to use to develop "model" Texas xDSL interconnection terms and conditions -- succeeded in delaying that entry until late last year. During the window created by that delay, SWBT has aggressively rolled out its own xDSL service in Texas. As a result, SWBT is currently the only carrier in Texas that can provide a retail customer with local voice service and advanced data services over a single loop. If SWBT is permitted to deny its xDSL service to customers who seek to change voice providers, and its present Application to provide long distance service is approved, then customers who want "one-stop shopping" for local voice and data plus long distance in Texas will have only one alternative -- SWBT.

Second, AT&T is attempting to compete in the small and medium-sized business market in Texas through the use of unbundled loops with number portability. For this strategy to succeed, AT&T must rely upon SWBT to provision such "hot cut" orders accurately, reliably and timely in commercial volumes. To date, however, SWBT has failed to show that it can meet (or even approach) that standard -- and thus SWBT has failed to give AT&T (or any other CLEC) a meaningful opportunity to compete. See Section I.B below. Specifically, jointly

[7] Tonge/Rutan Decl. ¶¶ 62-77.

Application; however, once again, appropriate contractual amendments will eliminate the problem.

Some other problems may be close to being solved, but SWBT's premature Application will, if granted, prevent the Commission from seeing that they have been. For example, SWBT claims to have implemented a new test environment for testing new OSS releases; however, it has never been validated through testing. And again, SWBT has promised to provide versioning capability in July; however, it has not yet done so. It may be that these and other problems can be resolved, but they preclude a finding of checklist compliance today.

Finally, to the extent that some problems may take somewhat longer to solve -- like the xDSL issues set forth in Section I.A below -- they are problems of SWBT's own making. By abusing its bottleneck control of the loop, stonewalling would-be xDSL competitors, refusing to negotiate interconnection agreements in good faith, unlawfully suppressing documents and other information in arbitration, and otherwise abusing its monopoly power, SWBT has so successfully stymied DSL competition in Texas that it now has no plausible "competitors" to point to in order to demonstrate the "operational readiness" of its xDSL-related OSS or to prove that it provides nondiscriminatory access to the xDSL capabilities of the loop.

ARGUMENT

I. SWBT HAS FAILED TO COMPLY WITH THE COMPETITIVE CHECKLIST

A. SWBT Has Failed To Provide Nondiscriminatory Access To xDSL-Capable Loops And It Is Using Its Status As The Sole xDSL Provider In Texas To Protect And Extend Its Voice Monopoly.

For almost two years, SWBT has stubbornly resisted the entry of advanced service competitors in Texas, even as it has rapidly and successfully deployed its own advanced services. Today, SWBT is exploiting its control over essential xDSL-related inputs, not only to prevent

advanced services competition from AT&T and others, but also to perpetuate its virtual monopoly over the market for local voice services.

In its brief, SWBT seeks to portray CLEC interest in xDSL as a "nascent" development and SWBT's efforts to meet CLEC demand for xDSL-capable loops as "intensive[]." SWBT Br. 39-45. In this alternate universe of SWBT's imagination, independent testing and commercial performance measurement data have demonstrated SWBT's complete fulfillment of its statutory responsibilities, and performance remedies and formation of a new corporate affiliate provide further assurance that xDSL competition will thrive.

This is all nonsense. SWBT has not, in fact, complied with its statutory duties to provide nondiscriminatory access to xDSL-capable loops (47 U.S.C. § 271(c)(2)(B)(ii)&(iv)) and the operational support systems and processes that are needed to enable Texas consumers to benefit from a competitive market for xDSL services ((47 U.S.C. § 271(c)(2)(B)(ii)). Indeed, SWBT's xDSL activities to date reveal an unmistakable pattern of efforts designed to reinforce and extend its current market dominance. SBC's avowed goal is to ensure that "only SBC will have all the pieces" needed to provide the full package of services that customers want.[8] Unless SWBT is forced to change its current practices, approval of SWBT's long distance Application would permit SWBT, and no one else, to offer a full array of telecommunications services -- local, long distance, and xDSL.

[8] SBC Communications, Inc., "SBC Launches $6 Billion Initiative To Transform it into America's Largest Single Broadband Provider," SBC News Release at 5 (Oct. 18, 1999) ("SBC Pronto Press Release")(quoting SBC Chairman Edward E. Whitacre, Jr.), attached to the Declaration of C. Michael Pfau and Julie S. Chambers ("Pfau/Chambers Decl.") (Exh. C), as Att. 2.

1. SWBT Is Unlawfully Using Its Monopoly Control Over The Local Loop In Texas To Deter Both Advanced Services Competition And Voice Competition.

AT&T has committed enormous resources in pursuit of its strategy to provide consumers and businesses throughout the State of Texas with a competitive choice for local telephone services. But AT&T's ability to compete effectively, especially for residential consumers, remains critically dependent upon SWBT's compliance with its statutory obligation to provide efficient and nondiscriminatory access to combinations of network elements, including the "UNE-Platform." SWBT must also have policies, procedures, and practices in place that enable AT&T (by itself, or through partners) to provide consumers with the full range of services they desire, including advanced data services. Otherwise they will not be able to purchase some services -- and will, therefore, be less inclined to obtain any services -- from AT&T. Thus, SWBT's inability (or unwillingness) to support AT&T's and other new entrants' xDSL needs not only impairs competition for advanced services but also jeopardizes competition for voice services as well.

As both the Commission and Congress have recognized, high-speed data offerings constitute a crucial segment of the market for local telecommunications services, and, because of their importance, the manner in which they are deployed will also affect the markets for traditional telecommunications.[9] Many providers have recognized the growing consumer interest in obtaining "bundles" of services from a single provider. Certainly SBC, with its $6 billion commitment to "Project Pronto" (discussed below) has done so. AT&T is prepared to compete, on the merits, to offer "one-stop shopping" solutions. Competition, however, cannot

[9] The Commission has repeatedly recognized that there is a growing demand by residential and small business customers for xDSL-based and similar data services, and that it is most economical for such customers to receive data services over the same loop that they use to receive voice service. See, e.g., Line Sharing Order ¶ 33.

survive if only a single carrier is capable of providing consumers with a full package of local, long distance, and xDSL services. Recognizing this, SWBT has used every means at its disposal to ensure that it is the only carrier situated to do so.

As is more fully set forth in the Pfau/Chambers Declaration, SWBT's xDSL performance deficiencies are many and varied, but two are especially damaging to the prospects for competition and must be remedied by the Commission before SWBT obtains Section 271 authority. First, SWBT must not be permitted to deny its xDSL service to customers who choose to obtain their voice service from a competitor that is using the UNE Platform. Second, SWBT must establish nondiscriminatory operational procedures to enable CLECs that use the UNE-P architecture to provide voice services, to also offer xDSL capabilities to their customers -- either by themselves or through partnerships with other carriers.

As to the first point, in September 1999, a SWBT customer, who had been using SWBT's local voice service and xDSL service combined over a single, copper local loop, decided to switch his local voice service to AT&T. The customer placed his order to change his local voice service to AT&T, which forwarded it to SWBT as an ordinary request for UNE-P local service. SWBT filled the order, and the customer proceeded to use AT&T local voice service and SWBT data service on the same line. Subsequently, however, the customer was contacted by SWBT and informed that his xDSL service must be disconnected unless he switched his voice service back to SWBT. Faced with this Hobson's choice, the customer -- who was an AT&T employee -- returned to SWBT as his local voice provider.[10] Subsequent calls to SWBT have

[10] See Pfau/Chambers Decl. ¶ 29. The customer's ability to receive both AT&T local voice service and SWBT xDSL service debunks any notion that there are technical reasons why the xDSL technology SWBT has employed must be linked to the carrier that provides the voice service. Id. ¶ 30.

confirmed that this experience is not an isolated event; SWBT will not provide its xDSL service to customers who decline to choose, or to keep, SWBT as their voice carrier.

As to the second point, SWBT has frustrated AT&T's attempts to partner with a data CLEC, IP Communications, Inc. ("IP Communications"), to provide an integrated bundle of voice and data services over a single copper loop using UNE-P. Specifically, SWBT declined to provide IP Communications with any realistic procedures it could use to provision xDSL on an UNE-P line provided by another CLEC.[11] Then, when orders were submitted to attempt to add xDSL capability to an existing AT&T UNE-P line, SWBT rejected them, with only the most cryptic of explanations.

As discussed in section 4 below, both types of practices are unlawful.

2. SWBT's Obstructionism Refutes Any Claim That It Provides xDSL-Capable Loops On A Nondiscriminatory Basis.

CLECs have been trying to enter the xDSL market in Texas for almost two years, but they have been unable to do so because SWBT has refused to provide them with access to essential network facilities and services. See Pfau/Chambers Decl. ¶¶ 47-61. SWBT has taken unreasonable and unjustifiable positions in negotiations, abused the arbitration process, and reneged on agreements and promises made to regulators and competitors alike. Id. As a consequence, its conduct seriously stalled competitive entry in the xDSL market, and SWBT is now unable to produce data showing that it can provision xDSL-capable loops to competitors in

[11] Pfau/Chambers Decl. ¶¶ 36-40. SWBT stated that in order to provide the services on a single loop (as SWBT does today), IP Communications would be required to (1) order a new loop for xDSL (instead of using the customer's existing loop), (2) submit a second order for an unbundled port to connect the back end of the splitter to the customer port, after which (3) SWBT would disconnect the existing UNE-P line. This unwieldy process, of course, would entail significant expense and delay by imposing needless circuit rearrangements, and also create the risk of service disruption for the customer. Id. ¶ 38.

a non-discriminatory manner. SWBT has only itself to blame for the absence of evidence demonstrating that it can provision xDSL loops for CLECs.[12]

Much of the delay stemmed from prolonged arbitration proceedings involving Covad and Rhythms, two xDSL CLECs. During the course of that arbitration, SWBT was found to have improperly instructed employees to destroy documents during discovery, designated witnesses who did not have knowledge of core issues and therefore "presented an inaccurate and incomplete picture of the facts," and failed to produce hundreds of documents that went to the "central, critical issues" in arbitration. Pfau/Chambers Decl. ¶ 54. Ultimately, the Texas Arbitration Panel found that SWBT's xDSL practices "serve[d] to impede rapid implementation of competitive xDSL services"[13] and rejected as unreasonable nearly two dozen of SWBT's proposed restrictions on the preordering, ordering and provisioning of xDSL-capable loops.[14] Although it lost on the vast majority of issues and was forced to pay hundreds of thousands of dollars in sanctions for discovery abuse, SWBT succeeded in its larger goal of delaying xDSL competition.

Because of SWBT's foot dragging, CLECs were not in a position to submit xDSL orders consistently until quite recently. As a result, Telcordia (the company selected to oversee the

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[12] As TPUC Commissioner Walsh observed, "Southwestern Bell . . . delayed the ability of these [DSL competitors] to enter the market and our ability to review commercial data to evaluate Southwestern Bell's wholesale provision of DSL capable loops. Southwestern Bell should not now benefit from having this critical requirement glossed over in the 271 Application." TPUC Project No. 16251, 11/4/99 Open Meeting Tr. at 26, attached to Pfau/Chambers Decl. as Attachment 1.

[13] See Arbitration Award ("DSL Arbitration Award"), at 16, attached to Pfau/Chambers Decl. as Attachment 22.

[14] See Pfau/Chambers Decl. ¶¶ 58-59. Even then, SWBT made no concessions until the eve of the TPUC's vote on its Section 271 Application, when it belatedly pledged to undertake additional planning and development activities. Three weeks after the TPUC vote, moreover, SWBT challenged the Arbitration Award. See id. ¶¶ 60-61.

carrier-to-carrier test of SWBT's OSS systems) simply did not analyze a sufficient number of xDSL orders to support any conclusion regarding SWBT's ability to provision xDSL loops for CLECs.[15] Moreover, arrangements for pre-ordering, ordering, and provisioning of xDSL loops have changed, and continue to change, as a result of the Arbitration Award on November 30, 1999, and various promises SWBT made to the TPUC on the eve of the December 16 vote. Thus, the key performance measurements for xDSL provisioning were not even established by the TPUC until after the conclusion of Telcordia's testing. All of this is flatly inconsistent with the Common Carrier Bureau's advisory letter on third party testing, which recommended testing of "significant volumes of xDSL orders (i.e., xDSL-capable loops)."[16]

As for commercial usage, SWBT's obstruction has left it with no meaningful data to support its contention that it can provision xDSL-capable loops for CLECs in large quantities. During the period covered by the performance data relied upon in the Application, SWBT provisioned a total of only 139 xDSL loops -- not the 44, as suggested by the Application. Pfau/Chambers Decl. ¶ 79. This falls far short of the "extensive commercial usage" the Commission requires as a substitute for adequate independent testing of xDSL provisioning systems.[17] Moreover, SWBT's own affiant finds the volume of commercial usage to be so small as to preclude drawing any "statistically valid" conclusions concerning xDSL OSS capabilities.[18]

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[15] Pfau/Chambers Decl. ¶ 70. To the extent Telcordia's limited xDSL testing has any probative value, it indicates that CLECs face significant difficulties in ordering xDSL-capable loops even in small volumes. Id. ¶¶ 70-77.

[16] Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, to Nancy Lubamersky, US WEST, at 3 (September 27, 1999), attached to Pfau/Chambers Decl. as Attachment 37.

[17] See BA-NY Order ¶ 335 ("extensive commercial experience is a prerequisite to the use of performance data to demonstrate non-discriminatory provisioning practices for xDSL"); see also Ameritech Order ¶ 138.

[18] See, e.g., Dysart Aff. ¶¶ 18, 333, 474.

And, for the limited number of measurements where the quantity of orders was sufficient to report,[19] SWBT's own data shows an "out-of-parity" result in one of every five reporting categories.[20]

In sum, SWBT is asking the Commission -- and its competitors -- to rely on promises or predictions, not performance. There is no credible evidence that OSS systems crucial to the provisioning of xDSL-capable loops are functioning properly now, or that they will in the future. And while "paper promises" are never sufficient to support a Section 271 application, SWBT's promises seem particularly unworthy of reliance in light of SWBT's past conduct.

3. SWBT Has Rapidly Deployed Its Own Retail xDSL Service.

In contrast to the lengthy delays and arduous provisioning practices inflicted on its would-be xDSL competitors, SWBT has rolled out its xDSL service to retail customers throughout Texas at lightning speed. SBC's retail xDSL strategy, aptly named "Project Pronto," is the cornerstone of the company's efforts to offer "bundled" telecommunications services. SBC has described Project Pronto as "an unprecedented, $6 billion initiative . . . to transform the company . . . into the largest single provider of advanced broadband services in America."[21] SBC plans to make xDSL services available to 80 percent of its 77 million customers by the end

[19] The volume of commercial usage tested was so small that SWBT did not have enough data to draw statistically valid conclusions for the vast majority of xDSL performance measurements. Pfau/Chambers Decl. ¶¶ 78-81.

[20] Pfau/Chambers Decl. ¶ 80.

[21] SBC Pronto Press Release.

of 2002,[22] and has already deployed xDSL service in 500 central offices and made its xDSL service available to over 10 million potential customers.[23]

For its part, SWBT has moved quickly to implement Project Pronto in Texas and four other states.[24] Although Texas-specific numbers are not available, Texas is surely contributing significantly to SBC's overall xDSL installation rate of 1100 per day[25] -- more than the total number of xDSL loops provisioned to all CLECs in Texas in the 18 months since they first initiated interconnection negotiations with SWBT. SWBT now makes xDSL service available in 218 Texas cities and towns, including Dallas, Fort Worth, Houston, San Antonio, Lubbock, El Paso, Beaumont, Austin, Corpus Christi, Frisco, Irving, Plano, Odessa, and Abilene.[26] Moreover, SWBT has xDSL facilities deployed in zip codes that include over 70 percent of the state's population.[27]

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[22] "SBC Reports Strong Revenue and Earning Growth for Fourth Quarter, Full-Year 1999," at 3, SBC Investor Briefing (January 25, 2000) ("SBC Investor Briefing"), attached to Pfau/Chambers Decl. as Attachment 3.

[23] Id.

[24] Six months ago, SWBT's plan for Texas and the other four SWBT states was to "deploy ADSL in 271 central offices by the end of the year," enabling it to reach 3.8 million residential customers. See "Southwestern Bell Launches High-Speed DSL Services in San Antonio," SBC News Release (July 1, 1999), attached to Pfau/Chambers Decl. as Attachment 5. More recently, SBC has declared that "Project Pronto deployment is ahead of schedule." SBC Investor Briefing at 3.

[25] SBC Investor Briefing at 3.

[26] Id. See Jennifer Darwin, "Southwestern Bell Puts 'Net Plans in Overdrive as High-Speed Option," Houston Business Journal, October 22, 1999 at 19 (quoting SWBT technologist as saying, "One hundred [SWBT employees] in Houston do nothing but install ADSL all day long"); see also Dwight Silverman, "SBC Maps Superfast Access Plans -- Most of Houston to See ADSL Upgrade by 2002," Houston Chronicle, October 19, 1999, at 1, attached to Pfau/Chambers Decl. as Attachments 8 and 9, respectively.

[27] Pfau/Chambers Decl. ¶ 14.

Of course, SWBT's remarkable progress in rolling out xDSL offerings would not have been possible if the company's retail operation had encountered the same kinds of delays that competitors have faced in obtaining xDSL facilities. While SWBT has every right to try to win customers for its bundled local voice and data services, it cannot, at the same time, foreclose competition by denying competitors nondiscriminatory access to xDSL loops or preventing them from adding xDSL to UNE-P lines.

4. SWBT's Practices Regarding xDSL Are Unlawful.

As discussed below, SWBT's constriction of customer choice -- by denying its xDSL service to customers who switch to a UNE-P CLEC and by refusing to enable voice CLECs using UNE-P to add their own (or a partner's) xDSL capabilities -- violates the Act and the Commission's prior orders in several respects: (1) SWBT's practice of denying its xDSL offering to customers who obtain voice service from a CLEC that uses UNE-P violates section 251(c)(3); (2) SWBT's unlawful practices constitute an unjust and unreasonable "penalty" on the exercise of consumer choice and are unjustly and unreasonably discriminatory in violation of Section 201(b); and (3) SWBT's failure to provide and support fully functional and nondiscriminatory operational procedures that enable voice CLECs using UNE-P to offer xDSL capabilities on the same loop (either on their own or with others), constitutes unreasonable discrimination in the provisioning of loops and OSS, in violation of both Sections 251(c)(3) and 201(b). Each of these matters is discussed below.

First, SWBT's practice of denying its xDSL service to a customer who switches to a CLEC that uses UNE-P to provide voice service is unlawful under section 251(c)(3). This section requires that access to UNEs be provided on "rates, terms and conditions that are just,

reasonable and nondiscriminatory."[28] A CLEC is not provided such access if the customers to whom it wishes to provide voice service using UNEs must discontinue -- or render themselves ineligible to receive -- xDSL service from SWBT, particularly when SWBT (due to its own hobbling of its competitors) is the only carrier now able to provide such service.

In this regard, SWBT's conduct is closely analogous to an ILEC's use of excessive termination liabilities to restrict resale competition. Specifically, the Commission has held that, because the "imposition of [termination fees] creates additional costs for [an existing customer of an ILEC] that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale," in which case "termination liability could constitute an unreasonable restriction on resale." BA-NY Order ¶ 389. Threats to terminate xDSL service to a customer who wants to switch to a competing provider of voice service can be an equally if not more effective deterrent than the imposition of a monetary penalty, and thus likewise restrictive of customer choice. This practice clearly "ha[s] the effect of insulating portions of the market from competition" through UNEs.

Indeed, far from enabling competing carriers to use UNEs to "provide the services they seek to offer" and promoting customer choice, SWBT's practice of terminating its xDSL offering for customers who change voice service providers impairs CLECs' ability to provide service, and restricts customer choice. Thus, it has exactly the opposite effect on competition than the statute intended, i.e., it insulates a large portion of the telecommunications market from competition and enables SWBT to lock up important segments of the voice market by making it unattractive for

[28] The Commission has consistently interpreted Section 251(c)(3) to mean that ILECs must provide access to unbundled loops in a manner that promotes the rapid development of competition to the greatest number of consumers. UNE Remand Order ¶ 200; Local Competition Order ¶ 441. In doing so, the Commission has articulated its conviction that "greater, not fewer, options for procuring loops will facilitate entry by competitors," and that "Congress intended for competitors to have these options available." UNE Remand Order ¶ 200.

customers to switch to other providers. As a result of SWBT's failure to permit other carriers to use UNE-P to offer end users xDSL capabilities, either on their own or with others, SWBT is the only carrier that is able to provide a retail customer local voice service and advanced data services over a single loop. If SWBT is permitted to continue this practice, and if its Application to provide long distance service were granted, then customers who desire one-stop shopping for local voice, data, and long distance service in Texas would have only one alternative: SWBT. This is the avowed purpose of SWBT's "Project Pronto" strategy; indeed, SWBT openly boasts about it.

Second, SWBT's practice of denying its xDSL service to a customer who obtains voice service from a UNE-P CLEC, as well as its refusal to enable voice CLECs using UNE-P to add their own (or a partner's xDSL capabilities), constitutes an "unjust" and "unreasonable practice," and is thus unlawful under Section 201(b).[29] Currently, SWBT is the dominant provider of local voice and data services, with 99.8 percent of all residential subscribers in Texas served over SWBT's facilities. See Kelley/Turner Decl. at ¶¶ 12, 32.

SWBT's practice is a clear attempt to leverage its market power in local voice and data services to maintain an unfair advantage over its "captive" subscribers by effectively bundling its xDSL service with its voice offering. The Commission has held that Section 201(b) prohibits carriers from bundling services to constrain competition.[30] Threatening to terminate xDSL service to a customer that wants to switch to a UNE-P CLEC falls squarely within this prohibition. Unlike the bundling of 800 service, which was limited to a relatively small number

[29] AT&T v. Iowa Utilities Board, 119 S.Ct. 721, 72, 729-731 (1999) (holding that Section 201 applies to implementation of local-competition provisions). And the xDSL service is, for the most part, an interstate access service anyway, and thus subject to FCC jurisdiction.

[30] Competition in the Interstate Interexchange Marketplace.

of customers, SWBT's practice of denying its xDSL service to customers who switch to a UNE-P CLEC is a bald attempt to shut down competition in both the voice and data service markets.

Moreover, SWBT's failure to cooperate in maintaining xDSL service in conjunction with AT&T-provided voice service via UNE-P is an unjust and unreasonable "penalty" on the exercise of consumer choice and is unjustly and unreasonably discriminatory in violation of Section 201(b).[31]

Third, SWBT's failure to provide and support fully functional and nondiscriminatory operational procedures that enable CLECs who are employing a UNE-P architecture to provide voice services to offer xDSL capabilities, either on their own or with others, constitutes unreasonable discrimination in the provisioning of loops and OSS, which also violates Section 251(c)(3). SWBT currently provides arrangements, facilities and support processes that enable it, or, later, its data affiliate, to provide xDSL services over a single loop to retail customers efficiently and without disruption. As the Pfau/Chambers Declaration demonstrates, the physical arrangements that SWBT must establish for a UNE-P CLEC are identical to that which SWBT would encounter when line sharing with itself (or an affiliate) or with a data CLEC (even if the record keeping procedures are somewhat different).

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[31] SWBT has suggested obliquely in Texas that such competition-inhibiting practices are permitted, if not required, by the Commission's Line Sharing Order. That order, however, has nothing to do with situations in which an ILEC is providing xDSL service. Moreover, SWBT's approach produces the mirror image of precisely the condition that the Line Sharing Order sought to eliminate, i.e., residential and small business customers would need to forego their current xDSL provider (SWBT) in order to subscribe to the CLEC's voice service, "which robs consumers of market choices." Line Sharing Order ¶ 56. In the Line Sharing Order, the Commission explicitly recognized that "[r]equiring that competitors provide both voice and xDSL services, or none at all, effectively binds together two distinct services that are otherwise technologically and operationally distinct." Line Sharing Order ¶ 56. Yet any requirement that would permit an incumbent LEC, or its affiliate, to terminate its xDSL service when a customer announces his or her intention to migrate to a competitor for voice service has the same pernicious effect.

For all of the foregoing reasons, the restrictions that SWBT currently places on the use of its UNE-P offerings warrant a finding of noncompliance with the requirements of checklist items 2 and 4. SWBT does not provide nondiscriminatory access to combinations of unbundled network elements, or the OSS needed to combine UNEs to allow them to be used efficiently to provide both voice and xDSL.[32] At a minimum, unless and until processes, procedures, and mechanisms are deployed that enable CLECs using UNE-P to add their own -- or a partner's -- xDSL service reliably, seamlessly, and quickly, the Commission must not permit SWBT (or its affiliate) to deny its xDSL service to a voice customer of a CLEC using a UNE-P architecture.[33] The Commission must also make clear that any attempt to implement such an anticompetitive practice will be subject to immediate and severe penalties.

5. Creation Of A "Separate Affiliate" For Advanced Services Does Not Excuse SWBT's Failure To Meet Its Checklist Obligations.

SWBT's failure to demonstrate checklist compliance is not excused -- and the risk of unfair competition is not overcome -- by its creation of SBC Advanced Solutions, Inc. ("ASI") as a supposedly "separate affiliate" to provide advanced services. Even if the Commission believes that a properly constituted advanced services affiliate could establish checklist compliance, the characteristics of ASI do not permit any such determination here.

The Commission has expressed a willingness to consider "proof of a fully operational separate affiliate" as a possible basis for reducing the evidence a BOC must produce to demonstrate that it provisions unbundled xDSL-capable loops on a nondiscriminatory basis.

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[32] The Commission has ruled that OSS is itself a "network element." Local Competition Order ¶ 516.

[33] SWBT's offering of special discounts on unbundled loops for CLECs' advanced services does nothing to cure SWBT's unlawful activity. The incremental cost of attaching xDSL service in the high-frequency portion of the loop approaches zero. Therefore, a 50 percent reduction in the costs of the loop still gives the ILEC an enormous windfall and creates a barrier to entry for the CLEC.

AT&T COMMENTS
ERRATA
(Attachment 1)

LOCATION	CORRECTION
p. 4, l. 2	"Tonge/Rutan Decl. ¶¶ 30. . . ." should read "Tonge/Rutan Decl. ¶¶ 25, 30. . . ."
p. 15, l. 13	"44" should read "944".
p. 15, fn. 17	Insert close quotation mark after "experience" in the first line of the parenthetical ; delete close quotation mark after "xDSL" at the end of the parenthetical.
p. 17, fn. 24	Delete the first sentence and the cite following it and insert the following: "Last year, SWBT's plan for Texas and the other four SWBT states was to 'deploy ADSL in 271 central offices by the end of the year,' enabling it to reach 3.8 million customers. See 'California Offering Marks Biggest ADSL Rollout in any State; High-Speed Internet Access Headed to Southwestern Bell SNET Customers,' SBC News Release (January 12, 1999); 'Southwestern Bell Launches High Speed DSL Services in San Antonio,' SBC News Release (July 1, 1999), attached to Pfau/Chambers Decl. as Attachment 5."
p. 24, fn. 39, l. 4	"¶ 3(n)(3)" should read "¶ 4(n)(3)"
p. 26, fn. 46	"¶ 197" should read "¶ 202".
p. 35, l. 23	"4.8%" should read "5.3%"
p. 64, l. 18	"Id. ¶¶ 117-19" should read "Dalton/DeYoung Decl. ¶¶ 117-19".
p. 70, fn. 82	"Id. ¶ 201" should read "Dalton/DeYoung Decl. ¶ 201".
p. 75, l. 11	"Id. ¶¶ 104-06" should read "Id. ¶¶ 104-07".